

IN THE MATTER OF THE
FARM PRACTICES PROTECTION (RIGHT TO FARM) ACT, RSBC 1996, c. 131
AND IN THE MATTER OF A COMPLAINT
ARISING FROM MANURE MANAGEMENT PRACTICES ON A PROPERTY IN
ALDERGROVE, BRITISH COLUMBIA

BETWEEN:

PAUL AND IRENE ROHRER

COMPLAINANTS

AND:

ROBERT AND SHARON HALL

RESPONDENTS

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Honey Forbes, Presiding Member
Ron Bertrand, Member
Dave Merz, Member

For the Complainants

Paul and Irene Rohrer

For the Respondents

Pauline Gardikiotis, Counsel
Robert and Sharon Hall

Date of Hearing

January 28, 2010

Place of Hearing

Surrey, British Columbia

INTRODUCTION

1. The complainants, Paul and Irene Rohrer, operate a cow/calf beef operation located at 272nd Street in Aldergrove, British Columbia. They have approximately 40 acres at the home location and lease approximately 20 more acres further north on 272nd Street.
2. The respondents, Robert and Sharon Hall, operate Highcrest Farm Equestrian Centre. Their property consists of approximately 20 acres located between the Rohrer's home property to the south and the Rohrer's leased property to the north.
3. All three properties are in the Agricultural Land Reserve and zoned agricultural.
4. This complaint was received by the British Columbia Farm Industry Review Board (BCFIRB) on August 11, 2009. The notice of complaint alleges that the respondents did not follow normal farm practices with regard to manure management and runoff on their property. The complainants seek an order requiring the respondents to modify their farm practices.
5. The respondents deny the allegations and maintain that their manure management practices are in keeping with normal farm practice and in compliance with the *Farm Practices Protection (Right to Farm) Act* RSBC 1996 c. 131 (the *Act*).
6. BCFIRB retained Orlando Schmidt, M.Sc., PAg, Environmental Soil Specialist with the Ministry of Agriculture and Lands, as a knowledgeable person (KP) pursuant to section 4 of the *Act*. Mr. Schmidt conducted a site visit in September 2009 and prepared a report on the manure management practices of the respondents.
7. The complaint was heard in Surrey on January 28, 2010 after the conclusion of the *Hall v. Rohrer* complaint which is the subject of separate written reasons by this same panel. The parties agreed that the evidence in the *Hall v. Rohrer* complaint would form part of the record in this complaint. The panel had the benefit of a site visit conducted on the first morning of the *Hall v Rohrer* complaint. Closing arguments were received by written submission.
8. At the hearing, the complainants raised the issue of pollution as a result of manure laden run off from the respondents' farm. Issues of pollution are outside of the jurisdiction of BCFIRB and as such the panel will confine our decision to whether the complained of manure management practices and drainage issues accord with normal farm practices.

ISSUE

9. The issue as stated in the pre-hearing conference report was whether the Halls' farm operations with respect to manure management practices were conducted in accordance with normal farm practice? However at the hearing, the complainants

stated the issue as follows “the manure management practice to store and/or re-contour the property owned by Mr. and Mrs. Hall, Highcrest Farm Equestrian Centre is not normal farm practice”.

10. The respondents did not object to the issue being reframed to include issues relating to manure storage *and* re-contouring of the Hall property. Further, the respondents had the opportunity to respond and did respond to both aspects of the revised allegations of complaint during the hearing. Their written submission described the issue on the complaint as “whether the Halls’ fill practices and manure storage (coverage) practices are “normal farming practices” and therefore protected under the *Act*.”
11. The panel accepts that this complaint encompasses farm practices in relation to manure management and fill practices and our decision will address both these issues.

BACKGROUND

12. To place this complaint in context, some background information is necessary. The Halls purchased their property in 2003 and operate a horse rearing and training facility. They have boarded up to 23 horses at one time and currently have 8-9 horses in their care. The property has indoor horse pens, an indoor and outdoor riding arena and approximately 30 outdoor horse paddocks. One quarter of the 20 acre farm is occupied by buildings and small paddocks while the remainder is used for pasture or hay production.
13. There is a large horse barn situated on the high point of the Halls’ property. The outdoor riding arena is southwest after which the land gently slopes towards 272nd Street. There are horse paddocks on the east side of the barn and drainage occurs through a small south-north ditch across the Hall property emptying into a common drainage ditch on the north side of the property. East of this south-north ditch is a low area that the Halls refer to as the “soup bowl”.
14. The common drainage ditch runs east-west between the Rohrer leased property and the Hall property. It starts at the east end of the Rohrer leased property and flows back and forth over the property line between the two properties until it finally crosses onto the Hall property and proceeds west to the ditch on 272nd Street which drains into the Salmon River. Run off drains into this common ditch from the leased property, the east section of the Hall property and from the area east and north of the Rohrer barn (on the Rohrer property) via the small south-north ditch across the Hall property.
15. Initially, the Halls enjoyed an amicable relationship with the Rohrers. The previous owner of the Hall property allowed the Rohrers to use land for hay production and grazing. After the Halls purchased the property, this arrangement continued without incident from 2003 until 2006. The Rohrers were also given access across the Hall property to move cows and haying equipment to their leased property. The previous

owner of the Hall property and the Rohrsers also used the common ditch cooperatively, as did the Rohrsers and Halls from 2003 to 2006.

16. In the summer of 2006, Mr. Hall and Mr. Rohrer had a disagreement about manure transport across the Hall property to the leased property. Mr. Hall told B&B Cleanout Services, hired by Mr. Rohrer, that they could no longer have access across his property as the manure transport vehicle had created large ruts. Following this incident, the relationship and communication between the Halls and Rohrsers rapidly deteriorated and very little civil communication has occurred since 2006.

KNOWLEDGEABLE PERSON

17. Mr. Schmidt testified as to his findings based on his observations and discussions with both the Rohrsers and the Halls. He noted that the Hall horse pens are cleaned daily; manure and bedding is stockpiled outdoors on an earthen area immediately east of the outdoor paddocks. During the growing season, horse manure is periodically spread on the land. Mr. Schmidt described the manure pile as an accumulation of approximately one month of barn and pen cleaning materials, approximately 12' wide and 4' or 5' high.
18. Prior to the Halls purchasing the property in 2003, the previous owners had a large stockpile of horse manure (approximately 120' wide). The Halls began spreading this manure onto their land and at the time of the complaint, only a base layer of approximately 1' – 2' thick remained. Mr. Schmidt described this material as highly decomposed, resembling organic topsoil.
19. Mr. Schmidt observed that since purchasing their property, the Halls had made efforts to improve the usefulness of their land by adding fill to low lying areas on the east (back) of their property and east of their horse paddocks, elevating the area adjacent to the Rohrer property line. The Halls' stated purpose for this fill was to mitigate the increased drainage onto their property as a result of the Rohrsers' alterations to their property.
20. Mr. Schmidt was advised by the Halls that they had initially used some of the base pad from their previous horse manure pile as fill. They then obtained a Soil Permit from the Township of Langley to raise the area along the Rohrer property line approximately 3' above natural elevation.
21. Given the Rohrsers' allegation that the fill used in these areas was hog fuel and horse manure, capped with imported fill material, Mr. Schmidt examined the fill composition. He concluded that the material used in the low east area of the property was primarily mineral material sourced from the horse paddocks. In his view movement of mineral soil within farm boundaries to fill low lying areas is widely done and is consistent with generally accepted farming practices. Regarding the materials used in the south fence area of the Hall property, he concluded that the underlying layer likely originated as horse manure and bedding but was highly

22. Mr. Schmidt concluded that, although the Halls have not conducted any illegal activities in the placement of fill, they should plan out the remainder of the project, preferably in cooperation with the Rohrsers, in order to enhance the agricultural production of both properties and ensuring adequate drainage. Regarding Mr. Hall's manure storage practices, Mr. Schmidt recommended an appropriately sized covered storage area with an impermeable base located at least 30 meters from a water course in compliance with the *Agricultural Waste Control Regulation*.

DECISION

23. Under section. 3 of the *Act*, a person who is aggrieved by an odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, may apply to BCFIRB for a determination as to whether the disturbance results from a normal farm practice. If, after a hearing, the board is of the opinion that the disturbance results from a normal farm practice, the complaint is dismissed. If the practice is not a normal farm practice, BCFIRB can order the farmer to cease or modify their practice.
24. A complaint under the *Act* involves a two-step analysis. First, the panel must be satisfied that the complainants are aggrieved by the odour, dust, noise or other disturbance emanating from the farm operation. If the complainants fail to establish that they are aggrieved, the complaint must be dismissed, without need to consider whether the alleged source of the grievance results from a normal farm practice. Once the initial step has been satisfied, the panel must go on to make a determination as to whether the grievance results from a normal farm practice.
25. The panel turns first to the issue of whether the complainant was aggrieved. The respondents ask that the complaint be dismissed under section. 6(2) of the *Act* arguing that it is frivolous or vexatious and/or not made in good faith. They allege that the Rohrsers initiated this complaint solely in response to the Halls' complaint, not because they felt they had a valid and legitimate complaint. The complainants further allege that the Rohrsers' intent is to try to deflect attention from their own unacceptable farming practices by pointing the finger at the Halls.
26. The panel is not convinced by this argument. There have been significant alterations through the use of fill and re-contouring on both the Hall and Rohrer properties since 2006. As a result, there have been changes to the drainage patterns on both properties. Manure has been used on both properties. There has been considerable and escalating antagonism between the parties.

27. In the *Hall v. Rohrer* complaint decision, we observed at paragraph 33:

In the spring of 2007, Mr. Rohrer began modifying the drainage on his property and asserted ownership over the historically “common” ditch. Mr. Hall also made modifications to his property. In the site visit conducted by the panel, we observed large areas of exposed ground on both properties. There were ditches and trenches and piles of dirt. Some areas more resembled a construction site than two long-standing farm operations. Our view was only magnified after seeing photographs of what these properties used to look like. What is clear to this panel is that in undertaking modifications, there has been little care given to mitigate negative impacts on neighbours. In fact, the panel was left wondering whether the actual intent of some of these modifications was to improve usability of land or to create problems for a neighbour or perhaps a combination of both.

28. In the panel’s view, this passage has equal application to this complaint. For this reason, we are satisfied that the complainants have met the threshold of demonstrating that they are aggrieved by the manure management and fill practices on the Hall property. Having found the threshold question met, the panel will move on to determine whether the respondents’ on-farm practices that are the subject of this complaint, are consistent with normal farm practice. Section 1 of the *Act* defines normal farm practice as:

"normal farm practice" means a practice that is conducted by a farm business in a manner consistent with

(a) proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances, and

(b) any standards prescribed by the Lieutenant Governor in Council,

and includes a practice that makes use of innovative technology in a manner consistent with proper advanced farm management practices and with any standards prescribed under paragraph (b).

29. BCFIRB has previously considered the meaning of “normal farm practice” and “proper and accepted customs and standards as established by similar farm businesses under similar circumstances”. In determining whether a complained of practice falls within the definition of normal farm practice, the panel looks to whether it is consistent with proper and accepted customs and standards as established and followed by similar farm businesses under similar circumstances. In making this decision, we necessarily take into account the particular circumstances of the site both on its own and in relation to those around it. This includes factors such as the proximity of neighbours, their use of their lands, any relevant history, geographical or meteorological features, types of farming in the area, the nature of the disturbance, and the size and type of operation that is the subject of the complaint.

30. Turning to the issues on this complaint, we will consider the manure management practices then address the issues relating to the placement of the fill.

31. The complainants allege that the respondents have used manure inappropriately on their property including improper field storage of manure and the use of manure as fill. They allege that the Halls leave their manure pile uncovered after snow fall contrary to the “guidelines” and that their manure pile is too close to water ways resulting in contaminated run off draining into the common ditch.¹ They also allege that the Halls have used hog fuel and manure as fill to create a berm and raise the low lying east area of the Halls’ property (the imported fill was used as a cap). They say that the use of hog fuel and manure does not comply with the Soil Permit issued by the Township of Langley and contravenes the *Agricultural Land Commission Act*. Given that the *Act* requires that normal farm practice not be conducted in contravention of the *Environmental Management Act* or any land use regulation which includes regulations to the *Agricultural Land Commission Act*, the complainants argue that the use of this fill is not normal farm practice.
32. The respondents deny that their manure management contravenes the Soil Permit, the regulations to the *Environmental Management Act* or the *Agricultural Land Commission Act*. In any event, they have not been found guilty of any breach under these Acts and it is not within BCFIRB’s jurisdiction to deal with alleged breaches or contraventions of these Acts.
33. Mr. Hall states that in the spring of 2006, before the deterioration in the relationship between the parties, Mr. Rohrer offered to fill low spots on the Hall property adjacent to the Rohrer fence line. Mr. Hall accepted this offer and Mr. Rohrer placed the fill. Subsequently, Mr. Hall applied for the Soil Permit with the Township of Langley to increase the agricultural use of the low lying areas of his property. In making this application, he was advised to use on-farm materials before applying for a Soil Permit. Mr. Hall acknowledged that he used material cleaned from the remainder of his paddocks as well as from part of a roadway to fill the area along the Rohrer fence line.² The manure from the large stock pile was used as fertilizer and spread over approximately 14 acres of his property. After that, he used materials from the excavation of the manure pile pad down to hardpan as fill; this material was decomposed. Once he had used all the available on-site material, he applied for and received the Soil Permit. He maintains that the fill material complied with the Permit.
34. Mr. Hall denies storing manure within 30 meters of a waterway. He states his manure pile is 33 meters from the small south-north ditch across his land and 45 meters from the common drainage ditch. He also states that since receiving the KP’s report, he has followed the recommendation to cover his manure pile. While he acknowledges one occasion where he was caught with the pile uncovered during sudden inclement weather, he states that all his practices relating to manure storage on his property are now in full compliance with normal farm practice. He has recently completed an Environmental Farm Plan assessment which found his manure storage practices to be

¹ By guidelines, we understand the respondents to be referring to the *Agricultural Waste Control Regulation* enacted under the *Environment Management Act*, BC 2003, c. 53.

² The complainants refer to this as the “berm”.

in compliance. Despite this, he intends to install a permanent manure storage structure next year.

35. First, in response to the complainants' argument that the respondents' manure management practices contravene certain Acts, we observe that BCFIRB does not have jurisdiction to determine whether there is or is not a breach of any statute other than the *Act*. Section 2 of the *Act* states:

Normal farm practices protected

2 (1) If each of the requirements of subsection (2) is fulfilled in relation to a farm operation conducted as part of a farm business,

(a) the farmer is not liable in nuisance to any person for any odour, noise, dust or other disturbance resulting from the farm operation, and

(b) the farmer must not be prevented by injunction or other order of a court from conducting that farm operation.

(2) The requirements referred to in subsection (1) are that the farm operation must

(a) be conducted in accordance with normal farm practices,...and

(c) not be conducted in contravention of the *Public Health Act, Integrated Pest Management Act, Environmental Management Act*, the regulations under those Acts or any land use regulation.

[emphasis added]

36. The purpose of this section is to preclude a court from making a finding of nuisance and/or issuing an injunction against a farm operation where the operation is being conducted in accordance with normal farm practices and not conducted in contravention of the *Health Act, Integrated Pest Management Act, Environmental Management Act*, the regulations under those Acts or any land use regulation. Section 2 is not part of the panel's narrow and specialised mandate of determining "normal farm practice" which is found in section. 3 of the *Act* nor does it empower this board to make findings regarding alleged breaches of those Acts or regulations.

37. Turning now to the issue of the respondents' manure management practices, we accept the opinion of Mr. Schmidt that the use of manure on the Hall property accords with normal farm practice. While Mr. Hall may not have been following normal farm practice initially in the storage of his manure, he has accepted Mr. Schmidt's recommendations and now covers his manure pile. Mr. Hall says that he intends to build a permanent structure for manure storage and the panel certainly endorses that practice. We also accept Mr. Schmidt's evidence regarding the appropriateness of the

fill materials. The Halls obtained the proper permits for the fill and appear to have followed them. There is no suggestion that the Township of Langley found the fill to be in contravention of the Permit. Mr. Schmidt inspected the fill and concluded that even if some of the material originated from the large manure pile, this material was sufficiently decomposed so as to essentially be soil. He expressed doubt that there would be any leachate from this material or from the remnants of the pile itself. In these circumstances, the panel finds that the respondents' manure storage and use conforms with normal farm practice and as such this aspect to the complaint is dismissed.

38. The main thrust of this complaint was not the composition of the fill or the use or storage of manure on the Hall property. Rather the main complaint was the negative impact of the Halls' fill on the drainage from the Rohrer property. The Rohrers argue that in September 2007, the Halls built a berm along the existing fence line to the height of the contouring done by the Rohrers in 1997-1998 on their side of the fence. They allege that this berm impeded free movement of the natural surface runoff from the Rohrer property to the Hall property and moved the low lying area to the Rohrer side of the fence between the berm and the contouring. The Rohrers built a detention pond to collect the water that no longer drained across the Hall property into the common drainage ditch. Mr. Rohrer says that it was only after being told to do so by Mr. Madsen of the Township of Langley, that the Halls enlarged the small south-north ditch across their property to allow for the natural runoff from the Rohrer property to drain towards the common drainage ditch. However, Mr. Rohrer argues that this small south-north ditch is not adequate to address all the runoff.
39. Mr. Hall agrees that he brought the fill elevation on the south of his property, adjacent to the Rohrer fence line, up to the height of the contouring done on the Rohrer property in 1998³. In his view, historic and recent changes done by Mr. Rohrer, including the construction of "the bullnose", increased drainage onto his property. He states he was attempting to "line up" his property elevation with that of the Rohrers as authorized by the Agriculture Land Commission (ALC) in its work project directive. He does not deny that his fill created a low lying area on the Rohrer property but he emphatically denies that his fill blocked or impeded drainage from the Rohrer property as any potential negative impact was alleviated by the installation of the small south-north ditch across the Hall property, as recommended by Mr. Madsen, that allows drainage from the Rohrer property into the common drainage ditch. Mr. Hall argues that he has complied with the work project directive from the ALC and the conditions associated with the Soil Permit from the Township of Langley and in any event, BCFIRB has no jurisdiction to determine non-compliance with either the directive or the Permit.
40. In considering the fill issue, the panel notes the respondents' reliance on compliance with the Soil Permit and ALC's work project directive as evidence of normal farm practice. A finding by a third party government agency that a particular operation meets their requirements or guidelines does not bind this panel in its determination of

³ The parties refer to this contouring on the Rohrer property as "the bullnose".

what is or is not normal farm practice. Compliance with another agency's requirements may be a useful starting point for determining normal farm practice, it is not determinative.

41. We find it significant in this case that despite revisions done by Mr. Rohrer in the late 1990's, drainage was stable and well established. The east area of the Hall property was historically a low lying area but previous owners and indeed the Halls from 2003 to 2006 did not report any significant drainage problems as a result of the bullnose. The bullnose and the associated drainage concerns only became an issue after the breakdown in the relationship between the complainants and the respondents in 2006.
42. There is no dispute that in 2007, the Halls started (and continued in 2008) a significant fill project involving approximately 200 truck loads of fill which in effect made a portion of the adjacent Rohrer property the low-lying area. The Halls say that they complied with the order of the Township of Langley to enlarge the small south-north ditch to allow drainage of water from the Rohrer property across the Hall property to the common drainage ditch and this has alleviated the drainage issues. The Halls also say that the Rohrers can address any further drainage issues in this area as the swale along the fence line of the Rohrers' property can still drain to the low point of the Rohrer property.
43. As we stated in the *Hall v. Rohrer* complaint, while we accept a farmer's right to improve drainage to more effectively use their property and maximize the profitability of their land subject to any applicable land use regulations, normal farm practice dictates that a farmer make reasonable efforts to mitigate negative impacts on neighbours. In this case, the Halls imported fill onto their property significantly altering the original topography and historical drainage. Despite following the requirements imposed by other government agencies, we conclude that these modifications have resulted in increased flooding on the Rohrer property. In considering whether or to what extent this flooding is consistent with normal farm practice, the panel finds that in these circumstances and given the historical drainage patterns, normal farm practice required Mr. Hall to take appropriate steps to plan for and mitigate the possible negative impacts of his drainage modifications on his neighbour. While Mr. Hall has taken some steps to mitigate the drainage concerns, these steps are not enough. Further, it is not an answer to say that Mr. Rohrer can fix the problem (caused by Mr. Hall) by draining the run off onto his own property.
44. Given our conclusion that the respondents have failed to adequately address the negative impacts of their fill on the drainage from the Rohrer property, we find the placement of this fill inconsistent with normal farm practice.

ORDER

45. Section 6 of the *Act* provides that a panel must dismiss a complaint if it is of the opinion that the disturbance results from a normal farm practice, and must order a farmer to cease the practice that causes the disturbance if it is not a normal farm

practice, or to modify the practice in the manner set out in the order, to be consistent with normal farm practice.

46. Regarding manure management, having found the respondents' practices in compliance with normal farm practice, this part of the complaint is dismissed.
47. Regarding the placement of fill by the respondents, and in accordance with the findings we have made regarding normal farm practice and to be consistent with normal farm practice, the panel orders the respondents, pursuant to section. 6(1)(b) of the *Act*, to modify their farm management practices as follows:
- a) in accordance with the advice and recommendations of a qualified professional, to develop a drainage management plan to be completed no later than November 1, 2010; a copy of which is to be provided to the Rohrsers and BCFIRB;
 - b) in accordance with the advice and recommendations of a qualified professional, to implement the drainage management plan as soon as practicable; and
 - c) to advise the complainants and BCFIRB of the anticipated completion date of the drainage management plan
48. In making the above direction and consistent with our comments in the *Hall v. Rohrer* complaint, in our view a drainage management plan takes into account the impacts of any modifications on adjacent land users and looks for ways to minimize or mitigate those impacts. This complaint, as did the *Hall v. Rohrer* complaint, demonstrated that drainage modifications cannot be done in isolation; run off does not respect property lines. The panel is of the view that the preferable approach is a single, integrated plan that looks at the drainage irrespective of property lines.
49. There will be no order as to costs.

Dated at Victoria, British Columbia this 26th day of August, 2010.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Honey Forbes, Presiding Member



Ron Bertrand, Member



Dave Merz, Member